



Deadline 4: GINA Limits Use of Genetic Information

As the fourth in a series of six articles on looming compliance deadlines for health plans, this article will remind you of the provisions of the Genetic Information Nondiscrimination Act (“GINA”) that relate to health plans and insurers.

GINA has an effective date of plan years beginning after May 21, 2009. As with many of the other statutes we have discussed, for calendar year plans, GINA will be effective **January 1, 2010**.

This month, HHS issued interim final regulations under GINA. Those regulations become effective for plan years beginning on or after December 7, 2009. Thus, for calendar year plans, the regulations also will be effective **January 1, 2010**.

GINA limits the use of genetic testing and genetic information by health plans and health insurers. GINA defines genetic information as information about: an individual’s genetic tests, the genetic tests of the individual’s family members, and the manifestation of a disease or disorder in a family member. It also includes information about an individual’s or family member’s fetus or embryo.

In general, GINA prohibits group health plans and insurers from:

- Adjusting group premium or contribution amounts on the basis of genetic information. But plans may increase premiums based on an individual’s manifested disease or disorder.
- Requesting or requiring genetic testing for individuals or family members. But plans may obtain test results when making payment determinations, as defined by HIPAA.
- Requesting or requiring genetic information for underwriting purposes, or before the individual is enrolled in the plan.
- Requesting or requiring genetic information prior to, or in connection with, a participant’s enrollment in the plan.

GINA further directs HHS to revise the HIPAA privacy regulations to provide that genetic information is treated as health information subject to the HIPAA privacy rules. The legislation also includes rules relating to genetic testing for research, individual policies and employment actions that are beyond the scope of this article.

Much of the recent controversy involving genetic testing has revolved around health risk appraisals. Clearly, GINA restricts requests for genetic information in these appraisals. For example, the interim final regulations provide that an individual cannot be required to complete a health risk assessment that

includes family history in order to receive an incentive under a health plan. On the other hand, a plan can request genetic information through a health risk assessment so long as no reward is provided to those who complete the assessment. To complicate matters even further, a plan can offer two health risk assessments: one which includes an award but requests no genetic information, and one which does not request genetic information but includes no award.

On a similar note, in a series of informal opinions under the Americans with Disabilities Act ("ADA"), the EEOC has:

- Opined that requiring employees to complete a health risk assessment to obtain health coverage violates the ADA.
- Opined that requiring employees to complete a health risk assessment to obtain reimbursement from a health reimbursement arrangement violates the ADA.
- Not taken a position on whether a health risk questionnaire would be deemed voluntary under the ADA if employees receive a premium rebate or other incentive for completing the questionnaire.

Thus, the status of health risk assessments remains cloudy, although many employer groups are willing to shoulder some risk on this issue due to the ever growing interest in wellness incentives. And several proposals before Congress seek to relieve restrictions on health risk assessments as part of the current health care reform debate in Washington.

To Do: Plan sponsors need to review their plan documents to ensure compliance with GINA. As a practical matter, GINA will affect plan practices more than plan documents. Plan sponsors should review carefully all health questionnaires and health risk assessment policies, including any discounts or incentives for participating in the program.

Dated: October 28, 2009